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No. 92-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHRYSLER CORPORATION,
Petitioner,
v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO; and LOCAL 793 THEREOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Chrysler Corporation's petition for a writ of certiorari. Respondents International Union, Allied Industrial Workers of America, AFL-CIO and Local 793 thereof, have refused consent. In support of this motion, EEAC by the following shows

that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. EEAC is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. Many of EEAC's members, and the constituents of its association members, are employers subject to collective bargaining agreements and regularly use the arbitration process to settle disputes. Accordingly, EEAC members support arbitration as a means of resolving contested issues, and indeed filed an *amicus curiae* brief supporting the enforceability of arbitration agreements in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

3. As employers, EEAC's members or their constituents also are subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. EEAC's members and member constituencies have a strong interest in maintaining workplaces that are free from sexual harassment. For this reason, EEAC members have instituted preventative measures designed to discourage sexual harassment, which include: adoption of policies expressly forbidding supervisors and employees to engage in sexually harassing conduct; publication of employee manuals and

posting of notices to inform employees of their rights; and training supervisors to recognize and halt harassment in the workplace. In addition, many members have implemented formal anti-harassment procedures whereby aggrieved employees can inform higher management authorities officially about harassing conduct in the workplace. These policies call for prompt and effective remedial action by the employer, including appropriate discipline of the offender.

4. Thus, the issues presented in the petition are extremely important to EEAC's nationwide constituency, which strongly disapproves of sexual harassment and has adopted procedures to prevent such activity. While EEAC's members firmly support the arbitration process and concur that arbitration awards generally should be insulated from judicial review, there are situations where, as here, an arbitration award may violate a well defined and dominant public policy, so that the court should refuse to enforce it. *United Paperworkers International Union v. Misco.*, 484 U.S. 29, 42 (1987). The Seventh Circuit below ruled incorrectly that the district court properly enforced an arbitration award reinstating an employee who was terminated for sexually harassing and assaulting a co-worker. Applying *Misco*, the Seventh Circuit should have ruled that the award violated the well defined and dominant public policy against sexual harassment in the workplace.

5. Because of its interest in the nation's civil rights laws, EEAC has, since its founding in 1976, filed briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC participated as *amicus curiae* in *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, No. 91-5261 (3d Cir. June 29, 1992) in which the Third Circuit ruled that an arbitration award reinstating an accused sexual harasser violated the public policy

against sexual harassment in the workplace. EEAC has participated in a number of other cases involving sexual harassment issues, including *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) (addressing the effect of an employer's prompt and effective response to a complaint of sexual harassment); and *Elrod v. Sears, Roebuck and Company*, 939 F.2d 1466 (11th Cir. 1992) (age discrimination claim by employee terminated for sexual harassment).

Also, EEAC has advised the Equal Employment Opportunity Commission (EEOC) on a formal and informal basis, including the filing of comments on EEOC's Interim Interpretive Guidelines on Sexual Harassment, published at 29 C.F.R. Part 1604 (1980). EEAC also has participated in other cases involving challenges to arbitration awards as violative of public policy, including *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757 (1983) (addressing EEOC conciliation agreement that conflicted with seniority provisions of collective bargaining agreement); and *Georgia Power Company v. International Brotherhood of Electrical Workers, Local Number 84*, 896 F.2d 507 (11th Cir. 1990) (arbitration award reinstating drug user overturned). Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case.

6. EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the instant case in the field of employment discrimination generally. Accordingly, this brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief this Court on the relevant concerns of the business community and the significance of this case to employers.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests the Court to allow it to participate as *Amicus Curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

Chrysler Motors Corporation ("Chrysler") discharged Ronald Gallenbeck from his job as a fork lift operator after his sexual assault on a female co-worker. Pet. App.

1a.[1] Gallenbeck was using a nearby telephone as Roxanne Barstow inspected a door panel in the Beaver Dam Marine and Industrial Products facility where he worked. *Id.* at n.1. Gallenbeck put down the telephone receiver, walked up behind Barstow, "reached under her extended arms, grabbed her breasts, and squeezed them." Pet. App. 47a. "He then returned to the telephone and stated, 'Yup, they're real.'" Pet. App. 1a at n.1.

His union, Respondent herein ("the Union"), filed a grievance challenging Gallenbeck's dismissal. The collective bargaining agreement between Chrysler and the Union allowed termination of employees "for cause" and gave the arbitrator the authority to determine the meaning and application of agreement terms. Pet. App. 2a.

Although Gallenbeck admitted the incident and Chrysler presented evidence of at least four other incidents it learned of after Gallenbeck's discharge, the arbitrator ruled that Chrysler lacked just cause to terminate Gallenbeck. The arbitrator disregarded the other episodes because they were unknown to Chrysler at the time of the discharge. Asserting that while "extremely serious offenses, such as stealing or striking a foreman usually justify summary discharge . . . less serious infractions call . . . for some milder penalty," Pet. App. at 51a, the arbitrator ruled that a penalty less than termination was warranted. Pet. App. 62a. The arbitrator ordered reinstatement with a 30-day suspension. *Id.*

Chrysler brought suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, asking that the arbitrator's award be vacated because it violated the

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[1] Citations to the Appendix to the Petition for a Writ of Certiorari are noted as Pet. App. ——. The opinion of the Court of Appeals for the Seventh Circuit below, reported at 959 F.2d 685, is reproduced as Pet. App. 1a-11a. The opinion of the district court, reported at 748 F. Supp. 1352, is reproduced as Pet. App. 12a-43a. The arbitrator's unreported decision and award are reproduced as Pet. App. 44a-62a.

public policy against sexual harassment in the workplace. Pet. App. 2a. The union counterclaimed, seeking attorney's fees and prejudgment interest on the back pay award. On cross-motions for summary judgment, the district court affirmed the arbitration award and ordered enforcement, but denied the Union's request for fees and interest. Pet. App. 2a-3a.

Both parties appealed to the Court of Appeals for the Seventh Circuit, which affirmed the district court's decision. Chrysler has petitioned this court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

National employment policy condemns sexual harassment in the workplace. Title VII of the Civil Rights Act of 1964, guidance issued by the EEOC—the enforcement agency—and numerous decisions by the courts, as well as legislation in most states, all confirm that sexual harassment, in the workplace is a serious concern and is not to be tolerated. Accordingly, employers have a legal obligation to strive to eradicate all forms of sexual harassment and are faced with substantial liability if they fail to take prompt and effective action to resolve sexual harassment complaints. An employer's endeavors to meet and fulfill this strong public policy should be met with special deference, not indifference, by arbitrators and the courts. The decision below requiring reinstatement of a sexual harasser conflicts with the important public policy against workplace sexual harassment.

Indeed, the Seventh Circuit's holding fails to follow the clear direction of this Court in *W. R. Grace and Co. v. Local Union 759*, 461 U.S. 757 (1983), and *United Paperworkers International Union v. Misco*, 484 U.S. 29 (1987), both of which confirmed a court's authority to overturn an arbitrator's award that violates a well defined and dominant public policy ascertainable by refer-

ence to laws and legal precedent. In direct conflict with the decision below, the Second Circuit in *Newsday, Inc. v. Long Island Typographical Union. No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991), applied *W. R. Grace* and *Misco* to find that an arbitrator's award reinstating a known sexual harasser violated the public policy against sexual harassment in the workplace. Confusion among the federal courts over the scope of a court's authority to overturn an award, and the degree of deference due the arbitrator's decision, create serious concerns for employers seeking to fulfill their obligation to eliminate sexual harassment, and should be resolved by this Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING REQUIRING REINSTATEMENT OF AN EMPLOYEE DISCHARGED FOR EGREGIOUS SEXUAL HARASSMENT CONFLICTS WITH NATIONAL EMPLOYMENT POLICY AGAINST SEXUAL HARASSMENT IN THE WORKPLACE AND THUS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

A. National Employment Policy Condemns Sexual Harassment in the Workplace

1. *Laws and Legal Precedents Prohibit Sexual Harassment in the Workplace*

The public policy against sexual harassment in the workplace is clear and well defined. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits, *inter alia*, sex discrimination in the workplace. 42 U.S.C. § 2000e-2(a)(1).[2] As this Court has explained:

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[2] Title VII prohibits discrimination with regard to "terms, conditions, or privileges of employment" on the basis of race, color, sex, religion and national origin. 42 U.S.C. § 2000e-2(a)(1).

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)). For this reason, sexual harassment is a form of sex discrimination prohibited by Title VII. *Vinson*, 477 U.S. at 66.

The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcement of Title VII, has issued guidelines that unequivocally confirm the strong public policy against sexual harassment in the workplace:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (footnote omitted). In particular, the EEOC has highlighted conduct like Gallenbeck's as the type that would constitute a Title VII violation:

> The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condi-

> tions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

EEOC Policy Guidance on Current Issues of Sexual Harassment N-915-050, reprinted in *EEOC Compliance Manual* (BNA) N:4031, 4047 (March 19, 1990).

In addition, almost all states have enacted antidiscrimination laws that include prohibitions of discrimination based on sex. 5 Employment Discrimination Coordinator (WGL) ¶ 80,118 (November 13, 1990). Many have statutes specifically prohibiting sexual harassment in the workplace. *Id.* at ¶ 80,200 (May 26, 1992).

2. *Employers Are Obligated To Remedy Workplace Sexual Harassment*

Both the EEOC and the courts have imposed an affirmative obligation on employers to strive to eliminate sexual harassment in the workplace. The EEOC's guidelines make its position clear:

> Prevention is the best tool for the elimination of sexual harassment. *An employer should take all steps necessary to prevent sexual harassment from occurring*, such as affirmatively raising the subject, expressing strong disapproval, *developing appropriate sanctions*, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (emphasis added).

In *Vinson*, this Court emphasized that courts should "look to agency principles for guidance" in determining whether an employer should be held liable for sexual harassment by its employees. 477 U.S. at 72. Indeed, "absence of notice to an employer does not necessarily insulate that employer from liability." *Id.*

When the employer *has* notice of such conduct, however, it clearly has a responsibility to remedy the situation. For example, the EEOC Guidelines hold an employer responsible for sexual harassment by co-workers if the employer, including its agents or supervisors, "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).

The courts of appeals have adopted this position as well. "The prevailing trend of the case law . . . seems to hold that employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees know, or in the exercise of reasonable care should have known." *Equal Employment Opportunity Commission v. Hacienda Hotel*, 881 F.2d 1504, 1515 (9th Cir. 1989) (holding employer liable because it had knowledge of sexual harassment and failed to take action).[3]

Employers who fail to take prompt, effective action to eliminate sexual harassment in the workplace are subject to significant penalties under federal and state law. *Elrod v. Sears, Roebuck and Company*, 939 F.2d 1466, 1470 (11th Cir. 1991) (in reversing jury verdict in favor of terminated sexual harasser, court noted that if company does nothing in response to complaints, it "runs a serious risk of incurring Title VII liability to those employees harassed."). Title VII in its original form provided affirmative remedies for employment discrimination, authorizing a court to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirm-

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[3] *Accord Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989) (employer took prompt action in response to complaints of hostile environment and thus not liable); *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986) (stating standard), *cert. denied*, 479 U.S. 1065 (1987); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (stating standard). *Cf. Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988) (applying same standard in Title IX sexual harassment case).

ative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). The remedies are no different when the claim is harassment. Accordingly, a court may issue an injunction against an employer found liable for harassment, and may also award back pay. *See, e.g., Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986); *Zabkowicz v. West Bend Co.*, 789 F.2d 540 (7th Cir. 1986).

In addition, Title VII was amended recently to allow recovery of compensatory and punitive damages. Civil Rights Act of 1991, P.L. 102-126, § 102 (1991) (to be codified at 42 U.S.C. § 1977a). The new law permits recovery in appropriate cases of up to $300,000 if the defendant employer has more than 500 employees. *Id.* Providing a monetary remedy for sexual harassment victims was a primary motivating force behind the new damages provision. H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 66-68 (1991); H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 2, at 25-26 (1991). Eradicating sexual harassment was a serious matter for employers long before the Civil Rights Act of 1991 added a monetary damages remedy. It is even more so now that the stakes are higher.

Moreover, employers may face class actions for hostile environment sexual harassment. In *Jenson v. Evelyth Taconite Company*, 139 F.R.D. 657 (D. Minn. 1991), a class of approximately 100 women was certified in the first sexual harassment class action in history. Ellen Joan Pollock, *Judge Approves First Sex-Bias Class Action*, Wall St. J., December 18, 1991 at B1. The case involves allegations of sexually explicit graffiti and posters as well as physical abuse, "kissing, pinching, and grabbing." 139 F.R.D. at 663.

In addition, state fair employment practices laws contain remedial provisions comparable to Title VII. Some provide only for "make-whole" remedies such as rein-

statement and backpay, while others allow recovery of compensatory and/or punitive damages. *See generally* 5 Employment Discrimination Coordinator (WGL) ¶¶ 80,118 (prohibition of sex discrimination); 80,200 (sexual harassment); 80,236 (damages).

Further, employees who experience harassment on the job may have a cause of action under state tort law. For example, in *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990), the Tenth Circuit recently upheld a jury verdict of $45,000 in actual damages and $45,000 in punitive damages on a pendent state claim of intentional infliction of emotional distress raised as part of a Title VII sexual harassment claim.

Thus, employers who fail to respond promptly and effectively to complaints of sexual harassment face enormous potential liability under both federal and state law.

3. *Because of the Strong Public Policy Condemning Sexual Harassment, An Employer's Decision To Discharge an Employee for Sexual Harassment Should Be Accorded a Special Degree of Deference*

Sexual harassment in the workplace is no less reprehensible when the perpetrator is a member of a union. Nevertheless, if the arbitration award in the instant case is allowed to stand, employers who attempt in good faith to eliminate unlawful sexual harassment in the workplace will be placed in a dilemma when the offending employee is a member of a union.

Under these circumstances, the employer's only legitimate choice is to take effective action to halt the harassment, and let the chips fall where they may. Unfortunately, as here, the employer's reward for its commendable endeavor may be lengthy and costly litigation, and at worst, an arbitration award reinstating the harasser with back pay.

In order for anti-harassment policies and programs to be effective, employers need some assurance that their

legitimate, nondiscriminatory efforts will be given credence by arbitrators. The opinion of the arbitrator here gives lip service to the important issue of sexual harassment in the workplace, then clearly relegates the issue to second class status. The arbitrator did observe that "[s]exual harassment in the workplace is of serious concern to employers, employees, and unions . . . ." Pet. App. 51a. Nevertheless, he pointed to "extremely serious offenses, such as stealing or striking a foreman" as justifying "summary discharge without the necessity of prior warnings or attempts at corrective discipline," while "[l]ess serious infractions call not for discharge for the first offense but for some milder penalty aimed at correction." *Id.*

By categorizing an incident where an employee walks up behind a female co-worker and grasps her breasts as a "less serious infraction" in comparison to stealing or striking a supervisor, the arbitrator sends a clear message that unwelcome physical, sexual contact is not a serious matter. Unlike the EEOC's characterization of such contact as something that would "seriously poison" the working environment, in this arbitrator's opinion it is less heinous than stealing company property.

The arbitrator's apparent indifference to the seriousness of Gallenbeck's offense, the impact on Gallenbeck's victim, and the important policy at stake, jeopardizes the efforts of Chrysler and other employers to eradicate sexual harassment from workplaces in this country. One of the most difficult problems of maintaining an effective anti-harassment program is convincing potential victims and perpetrators that the company takes harassment seriously and will not tolerate it. Communicating this point is critical to the success of the program. Treating a highly offensive personal assault such as grabbing a woman's breasts as a minor incident undermines any company's efforts to garner acceptance for its anti-harassment program.

To assist in increasing the effectiveness of anti-harassment programs, the courts should give special deference to

an employer's decision to discharge an employee for sexual harassment. As the arbitrator below noted, some offenses are indeed serious enough to warrant discharge. As he failed to discern, some sexual harassment offenses fall into this category. While progressive discipline may be appropriate for lesser offenses, an employer's decision that particular conduct merits termination should receive a substantial degree of deference from arbitrators and the courts.

Some federal courts have strongly endorsed employer discipline of employees who harass others, and dismissed a variety of charges challenging such action.[4] For example, the Eleventh Circuit recently overturned a jury verdict on an age discrimination claim by an accused harasser because the company's honest belief that the harassment occurred formed the legitimate, nondiscriminatory reason for his discharge. *Elrod v. Sears, Roebuck and Company*, 939 F.2d 1466 (11th Cir. 1991). As one district court has said, "It should be clear to corporate America, by now, that the law does not tolerate the type of behavior [the plaintiff] exhibited. The termination of employees who behave as [the plaintiff] did is justified and lawful. In fact, the only troublesome part of this case is that it took [the defendant employer] as long as it did to fire [the plaintiff]." *Anderson v. Hewlett-Packard Corp.*, 694 F. Supp. 1294, 1304 (N.D. Ohio 1988) (ruling in favor of the defendant in a suit by a discharged employee for breach of contract and promissory estoppel).

Likewise, "[a]n employer is not required to tolerate the disruption and inefficiencies caused by a hostile workplace environment until the wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action." *Carosella v. United States Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987). In *Johnson v.*

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[4] *See, e.g., Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991) (overturning arbitration award reinstating sexual harasser), discussed in detail *infra*.

Perkins Restaurants, Inc., 815 F.2d 1220 (8th Cir. 1987), the Eighth Circuit upheld the lower court's dismissal of the ADEA claim of a service technician who was fired almost instantly for kissing a sixteen-year-old waitress. The court accepted the employer's reason that Johnson was discharged for violating explicit company policy against sexual harassment and supported the employer's decision even though company policy required progressive discipline where appropriate.

Courts in other types of suits have given a heightened degree of credence to the employer's defense that it was acting in response to sexual harassment. For example, in a recent wrongful discharge case where a foreman was discharged for sexual harassment, the Tenth Circuit found the public policy opposing sexual harassment relevant to contract law, stating:

> Public policy also affects our construction of this contract claim. Here, public policy operates to require a construction of contract terms in favor of giving the employer broad discretion in its efforts to eliminate sexual harassment from the workplace. In this area of judicially created contracts and contract rights, it is perfectly consistent to impose a rule of contract construction which favors the enforcement of a workplace free from offensive sexual conduct.

Williams v. Maremont Corporation, 875 F.2d 1476, 1485 (10th Cir. 1989).

Similarly, the Fifth Circuit has held that the public policy against sexual harassment supports a qualified privilege, and a presumption of good faith, overcoming a claim for libel and slander arising out of a management bulletin published after an employee was discharged for sexual harassment. *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987). *Accord Stockley v. AT & T Information Systems, Ins.*, 687 F. Supp. 764, 769 (E.D.N.Y. 1988) ("communications made in connection with *bona fide* Title VII investigations are protected by

a qualified privilege" in a defamation suit by an offending employee).[5]

An employer who responds swiftly and effectively, yet fairly, to allegations of sexual harassment should not have to act at its peril when it discharges the offending employee. The employer's decision to terminate a known sexual harasser is more than a simple business decision. The employer's actions further sound public policy, in addition to meeting a significant legal obligation placed on employers by Congress and the courts to protect the rights of innocent victims. If an employer's investigation produces a good faith belief that unlawful conduct has occurred, and the employer determines that discharge is the appropriate remedy, that decision should be given special deference when it is later challenged in a grievance under a collective bargaining agreement. Therefore, EEAC urges the Court to grant the petition and use this case as the vehicle for establishing such a policy.

II. THE COURT OF APPEALS' HOLDING FAILS TO FOLLOW THIS COURT'S DECISIONS IN *W.R. GRACE* AND *MISCO*, AND CONFLICTS DIRECTLY WITH THE SECOND CIRCUIT'S DECISION IN *NEWSDAY v. LONG ISLAND TYPOGRAPHICAL UNION*, CREATING SERIOUS CONFUSION FOR EMPLOYERS

A. Under *W. R. Grace* and *Misco*, a Court May Vacate an Arbitrator's Award That Violates an Explicit, Well Defined and Dominant Public Policy that the Court Ascertains by Reference to the Laws and Legal Precedents

A district court's role in reviewing an arbitration award is limited. This makes sense "[b]ecause the par-

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[5] The court adopted the position advocated by the EEOC as *amicus curiae*. *Brief of the Equal Employment Opportunity Commission as Amicus Curiae In Support of Defendant's Motion For Summary Judgment, Stockley v. AT & T Information Systems, Inc.*, No. 86 Civ. 1643 (RJD) (E.D.N.Y.).

ties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, [and] it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). Similarly, courts must give great deference to the arbitrator's interpretation of the contract. As this Court stated in *Misco*, "[t]he arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *Id.* at 38.

Nevertheless, a court is prohibited from enforcing a bargaining agreement that is "contrary to public policy." *Id.* at 42 (citing *W. R. Grace and Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)). As the Court noted in *Misco* and *W. R. Grace*, such a doctrine derives from the more general legal doctrine that a court must not enforce contracts that violate the law or some other policy. A district court may refuse to enforce an arbitrator's interpretation of a contract as long as such a refusal to enforce is:

> limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' "

Misco, 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766). Indeed, it should be noted that the question of whether such a public policy exists is " 'ultimately one for resolution by the courts.' " *Id.*

As shown above, the public policy against sexual harassment in the workplace is undeniably "well defined and dominant," and is ascertainable from laws such as Title VII of the Civil Rights Act of 1964 and legal precedents

thereunder, including this court's decision in *Meritor Savings Bank v. Vinson* and numerous decisions of the courts of appeals. *See, e.g., Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, No. 91-5261, slip op. at 14 (3d Cir. June 29, 1992) ("under the circumstances present here, an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy."). The decision below thus conflicts with this well established policy.

B. The Decision Below Conflicts With the Second Circuit's Decision in *Newsday*

1. *In Contrast to the Court Below, the Second Circuit Ruled in* Newsday *that Reinstatement of an Employee Who Commits a Serious Sexual Harassment Offense Violates Public Policy*

In *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991), a case substantially similar to this one, the Second Circuit affirmed the district court's decision holding that an arbitrator's award that ordered reinstatement of an employee discharged for sexual harassment violated public policy.[6] Finding that the arbitrator's award "completely disregarded the public policy against sexual harassment in the workplace" and indeed "condones" sexual harassment, the Second Circuit concluded that the award "tends to perpetuate a hostile, intimidating and offensive work environment . . . [and] prevents Newsday from carrying out its legal duty to elim-

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[6] Significantly, the EEOC filed an *amicus* brief in *Newsday* supporting the district court's ruling. *Brief of the Equal Employment Opportunity Commission As Amicus Curiae, Newsday, Inc. v. Long Island Typographical Union No. 915, CWA, AFL-CIO*, No. 90-7236 (2d Cir.).

inate sexual harassment in the work place." 915 F.2d at 845.[7]

By upholding the reinstatement of an employee who had made repeated physical sexual assaults on his co-workers, the decision below conflicts directly with the Second Circuit's *Newsday* decision. In so doing, the decision below actually sidestepped the issue. After observing that "[t]he public policy doctrine allows this court to decide *de novo* whether the arbitrator's reinstatement of Gallenbeck violates public policy," Pet. App. 4a, and that "[t]he public policy against sexual harassment in the work place is well-recognized," *id.*, the Seventh Circuit inexplicably retreated to the conclusion that "[w]hile we do not condone Gallenbeck's behavior, it was within

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[7] The reasoning of the Second Circuit in *Newsday* is consistent with decisions of other circuits in cases involving employees who engaged in illegal activities as part of their performance of their employment duties and thereby posed a threat to others. In *Delta Air Lines v. Air Line Pilots Association, International*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 201 (1989), the Eleventh Circuit vacated an arbitration award ordering reinstatement of a pilot who operated a passenger aircraft while under the influence of alcohol. In *Georgia Power Company v. International Brotherhood of Eiectrical Workers, Local Number 84*, 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd per curiam* 896 F.2d 507 (11th Cir. 1990), the Eleventh Circuit vacated an arbitrator's award ordering reinstatement of an employee in a safety-sensitive position after he was discharged following a drug test that confirmed heavy marijuana use. *See also Iowa Electric Light and Power Company v. Local Union 204 of the International Brotherhood of Electrical Workers (AFL-CIO)*, 834 F.2d 1424 (8th Cir. 1987) (upholding district court's order vacating an arbitration award reinstating a nuclear power plant employee who was discharged for deliberately violating federal regulations on containment of nuclear materials, due to strong public policy favoring strict adherence to nuclear safety rules); *Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO, Local Union 540 v. Great Western Food Company*, 712 F.2d 122 (5th Cir. 1983) (arbitration award reinstating trucker who drank alcohol on duty violated public policy, considering effect on public health and safety as well as potential liability of employer for employee's actions).

the purview of the collective bargaining agreement and public policy for the arbitrator to order his reinstatement." Pet. App. 8a.

The Seventh Circuit tied its conclusion to the arbitrator's authority to craft an appropriate remedy. Pet. App. 6a-7a. However, this approach evades the court's own statement that it is to decide the public policy issue *de novo*. The issue is not whether the arbitrator had the authority to reduce the discipline meted out to Gallenbeck for his offense, but whether the arbitrator's decision, once made, violates the strong public policy against workplace sexual harassment.

2. *The Seventh Circuit Should Have Considered After-acquired Evidence in Making the Public Policy Determination*

That the court below, like the arbitrator, ignored evidence of Gallenbeck's prior offenses typifies the lower court's avoidance of its obligation to decide the public policy issue *de novo*. While the arbitrator may have had the authority to focus solely on the single incident known at the time of discharge to determine whether Chrysler had just cause, both the arbitrator and the Seventh Circuit should have taken the other incidents into consideration in determining whether Gallenbeck should have been returned to the Chrysler workforce.

Indeed, the Seventh Circuit's refusal to consider the additional evidence as part of its public policy determination conflicts directly with this Court's direction in *Misco*. While this Court in *Misco* reversed the Court of Appeals' decision for lack of an adequate formulation of public policy, it observed that "[i]n pursuing its public policy inquiry, the Court of Appeals quite properly considered" facts that were established in testimony but that were not considered by the arbitrator because they were not part of the basis of the termination decision. 484 U.S. at 44.

It is well recognized in the employment discrimination context that evidence that may not be relevant in determining whether there was just cause for termination may be quite relevant for other purposes, such as shaping the appropriate final outcome. Information discovered after an adverse employment decision is made cannot form the basis for that decision, but may affect the remedy available to the employee challenging the decision. *See, e.g., Summers v. State Farm Mutual Automobile Insurance Company*, 864 F.2d 700 (10th Cir. 1988) (after-acquired evidence that employee falsified documents bars relief for age discrimination claimant challenging termination); *Johnson v. Honeywell Information Systems*, 955 F.2d 409 (6th Cir. 1992) (misrepresentations on employment application discovered after termination barred relief on wrongful discharge and retaliation claims under Michigan law). Thus, the court below erred seriously in affirming the arbitrator's refusal to consider clearly relevant evidence.

C. The Unclear Directions Offered by the Courts of Appeals Create Serious Confusion for Employers that Should Be Resolved by this Court

As noted, the decision below conflicts directly with the Second Circuit's *Newsday* decision. Two other court of appeals' decisions on similar facts only add to the confusion. In *Communication Workers of America v. Southeastern Electric Cooperative of Durant, Oklahoma*, 882 F.2d 467 (10th Cir. 1989), the Tenth Circuit upheld an arbitrator's decision reinstating a long-term employee who had been discharged after a customer reported that he sexually assaulted her. The court appeared to defer to the arbitrator's choice of remedy, noting that it was a first offense and that the employee was contrite. 882 F.2d at 470. In *Stroehmann Bakeries v. Local 776, International Brotherhood of Teamsters*, No. 91-5261 (3d Cir. June 29, 1991), the Third Circuit overturned an arbitrator's award reinstating a delivery truck driver accused

of physically harassing a customer's young female night clerk because the arbitrator never made a determination that the harassment did not occur. The Third Circuit reasoned that the *Communications Workers* decision actually supported its conclusion, stating that "*Communitions Workers* does not stand for the proposition that objectively unwelcome sexual advances can be ignored by a labor arbitrator. The Tenth Circuit merely deferred to the arbitrator's choice of remedy." *Id.* (slip op. at 16).

The problem with this analysis is that it is the remedy itself—reinstatement of a known sexual harasser—that violates the well defined and dominant public policy against sexual harassment in the workplace. The difference between termination and a 30-day suspension is not merely a difference in degree of penalty, of interest only to the individual grievant. In the public policy context, the difference between termination and suspension is the difference between eliminating a known sexual harasser from the workforce and returning him to the scene of his misdeeds, perhaps to harass again.

Accordingly, employers who receive complaints of sexual harassment or sexual assault of a type that would warrant termination are left with no clear direction. They know there is a strong public policy against sexual harassment. They know also that they face severe sanctions if they know that sexual harassment has occurred and yet fail to take effective action. Nevertheless, the courts of appeals differ greatly on whether the employer's reasoned decision to uphold this public policy will be given proper consideration by the arbitrator.

Thus, EEAC urges the Court to grant the petition and recognize the strong public policy against workplace sexual harassment. Using this case as the vehicle, the Court should establish guidelines and rule that the employer's determination should be given special deference by an arbitrator.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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